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United States Court of Appeals

FOR THE SECOND CIRCUIT

CIVIL ACTION C-13707

JOSEPH ROTONDO,

Plaintiff-Appellant,

against

ISTHMIAN STEAMSHIP CO., INC.,

Defendant-Appellee.

APPELLANT'S BRIEF AND APPENDIX

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
21
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To be argued by
RALPH STOUT

United States Court of Appeals

FOR THE SECOND CIRCUIT

CIVIL ACTION C 13707

JOSEPH ROTONDO,

Plaintiff-Appellant,

against

ISTHMIAN STEAMSHIP CO., INC.,

Defendant-Appellee.

APPELLANT'S BRIEF

Statement of Facts

Plaintiff appeals from a judgment in favor of the defendant and against the plaintiff, rendered after a trial in the United States District Court, Eastern District of New York, before Hon. Clarence G. Galston, District Judge, and a jury; and entered herein on or about the 11th day of July, 1956. Plaintiff also appeals from an order of the said Court, dated June 18, 1956, which denied plaintiff's motion to set aside the verdict of the jury in favor of the defendant; and from an order of the said Court, dated November 9, 1956, which denied plaintiff's

motion (made by permission of this Court) for an order authorizing and directing the Clerk of the said District Court to furnish plaintiff's attorney with the names and addresses of the members of the jury who sat upon the trial of said action and rendered a verdict in favor of the defendant; and for other and further relief as hereinafter set forth.

The action was brought in the said United States District Court (by reason of diversity of citizenship) to recover damages for personal injuries sustained by plaintiff, alleged to have been the result of defendant's negligence. The action was begun by the service of the summons on or about July 27, 1953.

The complaint alleges that defendant, a Delaware corporation, owned or leased a certain vessel known as "S. S. Steel Apprentice"; that defendant operated said vessel and was in possession and control thereof; that said vessel was at the times mentioned in the complaint moored to the dock at Breakwater Pier, Erie Basin, in the Borough of Brooklyn, City and State of New York; that plaintiff (a citizen and resident of the State of New York) at the times mentioned was an employee of Jarka Corporation, a contracting stevedore, which had a contract for loading cargo on the said vessel at said pier; that on May 26, 1953 (Complaint amended to read May 24, 1953) plaintiff while pursuing his duties as longshoreman was lawfully on said vessel and was engaged in loading cargo into the said vessel; that on said date while plaintiff was performing his duties at or near hatch No. 2 on said vessel, he was caused to slip and fall, and sustained severe and permanent injuries; and that said injuries were caused solely and wholly because of the negligence of defendant, its agents, servants, and/or employees, and because of the unseaworthiness of said vessel.

The answer admits that at the times mentioned in the complaint the defendant owned and was in possession of

a certain vessel known as "S. S. Steel Apprentice", and that said vessel was then moored to said Breakwater Pier, Erie Basin; otherwise denies the material allegations of the complaint; and pleads, as an affirmative defense and in mitigation of damages, that any injuries sustained by plaintiff at the time and place set forth in the complaint were caused or contributed to by his own negligence.

The issues were tried before Judge Galston and a jury on April 30th and May 1st, 1956, and resulted in a sealed verdict in favor of the defendant. The plaintiff's subsequent motions, and the grounds therefor, are hereinafter set forth. The appeal is from the judgment entered upon the verdict, and from the orders denying the plaintiff's said motions.

The Facts

The plaintiff, Joseph Rotondo, testified that he was 41 years of age at the time of the accident on May 24, 1953; he was married, with two children, a daughter, 17, and a son, 13; in May, 1953, he was a longshoreman in the employ of Jarka; he was a header or boss of men in the hold (14);* on the day of the accident he was working on the steamship "Steel Apprentice" which was docked at the Breakwater Pier at the Erie Basin; May 24, 1953 was Sunday; he had worked that day at the No. 3 hatch from eight o'clock in the morning until about 8:30 at night when he and the men with him were transferred over to the No. 2 hatch (16); the top deck of the ship was known as the main deck, immediately below that was the shelter deck, beneath the shelter deck was the 'tween decks, and below that was the lower deck—they worked on the shelter deck at hatch No. 2; when they came there the hatch covers were in place on one half of the hatch and were

* Figures in parentheses refer to pages in the stenographer's minutes on file as part of the record.

off on the other half (17); on the closed half of the hatch there were piled up the hatch covers of the other half; the hatch was about 32 feet in width and 29 feet in length; the shelter deck was about 16 or 17 feet below the main deck, and the 'tween decks was about 20 or 25 feet below the shelter deck (18).

When the men went to work that night on the shelter deck there was cargo below in the 'tween decks; below the one-half of the No. 2 hatch the work was finished—men were still working in the other half (18). Around the shelter deck hatch opening was a coaming, consisting of a steel plate built on a slant from the edge of the opening to the level of the deck (19); the coaming was about six or seven inches high at the opening and slanted down to nothing at the deck; the width of the coaming was anywheres from 24 to 30 inches; the coaming was all around the four sides of the hatch it had a steel collar along the edge of the opening with a ledge on it for setting in place the steel beams on which the hatch covers rested (20); when men below had loaded from the bottom to the first deck, they put the hatch covers on, and that made a flooring—they then loaded on that, and they kept on to the next deck, when they did the same thing—when it was loaded up to the level of that deck they put the hatch covers on and again loaded therefrom (20); when the men went to work at the No. 2 hatch that night the whole square of the hatch above them on the main deck was open; on the shelter deck the hatch was one-half open, as men were still working below in the 'tween decks (20-21).

Cargo filled the wings on the shelter deck; there was fencing to hold the cargo in place; a fence consisted of stacks of lumber going up and down and across, which held the cargo from slipping with the movement of the ship; the fencing was built right up to the ceiling and all the way round (22); it was put together right on the ship by the carpenter; when plaintiff came to work at hatch No. 2 that cargo was already loaded and the fencing was

in place; the men at work on the shelter deck had a space in which to work only about 30 inches between the cargo with its fence and the opening of the hatch; and that space to work was on the slant of the steel coaming (22).

On the shelter deck where plaintiff and his men were working they had no lights; there was only a light coming off from a ladder forward—the ladder from the main deck to the shelter deck; in the 'tween decks below there were two flood lights which were pointed down and did not throw any light up on the shelter deck where the plaintiff was at work (22). Plaintiff was at work taking the hatch covers from off the hatch and putting them to one side; as he placed the hatch covers to one side some of them were over at the end where the men were working below, and plaintiff turned around to get some lash (rope) to lash them down; plaintiff was off the covers and on the slant of the coaming; all plaintiff then knew was that he slipped and went down (23); he went down from the shelter deck to the 'tween decks; he slipped and fell in the opening—he fell down 10 to 15 feet (23). Afterwards he was brought up by means of the winch on a pallet (a square plate on which cargo was brought in and out the hold) and put upon the dock (25); he was taken in a car to St. Peter's Hospital; he was suffering from bruises in the shoulder and arms; he had terrific pains in his back, and the next morning he complained of pains in his head, but there was nothing done about that; he was told there was something wrong with the ninth and tenth ribs—he was in pain all over (26); he was first treated at the hospital by Dr. Patella, and after leaving the hospital by Dr. Rini (who testified at the trial); Dr. Rini treated him from fifteen to sixteen months (27).

Since then plaintiff had not returned to work; he had tried to work, but couldn't; he had tried to move or pick up some cases, but couldn't (28); he hadn't the strength to do it (30); about three months after the accident he started to pass blood in the urine, and was sent by Dr.

Rini to a Dr. Pittone for examination (30); since then he had never been able to have sexual intercourse with his wife (30); he started to gain weight—at the time of the trial he weighed 280 (30); before the accident he had varicose veins, and in October, 1954, he had to go to St. Peter's Hospital on that account—he did not attribute the varicose veins to the accident (32); when working for Jarka he earned about $100 a week (33); he had not done any such work since, or any other work except helping his wife at their luncheonette (33).

On cross examination, plaintiff said that at the time of the accident he weighed 240, his height was five feet eleven, and he was in good health (34); he did not have any trouble with the varicose veins in his leg; he had never been told that he suffered from high blood pressure (35); prior to the accident on May 24, 1955, he had been on the "Steel Apprentice" all that day; he went down to that particular hatch about fifteen minutes before he was hurt; during that fifteen minutes he was at work moving the hatch covers (36); he was standing above the opening, about three feet from the actual opening (37); men were passing the hatch covers to him and one man behind him picked them up and piled them (38).

When plaintiff first came down the ladder to the shelter deck the hatch covers were over the one-half of the hatch; that furnished a platform on which he walked to his place of work over on the coaming plate (40); he worked there three or four minutes before the accident; he was not shifting around, he was standing still; the men pushed the hatch covers out to him and he grabbed his end so that the cover didn't go down (40); he could see what he was doing there (41); he was then off the covers and was on the slant of the coaming (43-44); he turned and started walking over to get a piece of lash hanging on the fence forward; he started to walk about two feet, slipped and fell, and landed on some cargo in the 'tween decks (43);

the slant of the coaming starts at the edge of the opening; it starts about six inches high and slopes down to nothing at the deck of the shelter deck, which was already loaded with cargo right up to that point (47); plaintiff turned around, started to walk forward and slipped, his foot going out in front of him, and he fell through the opening (49).

Before the accident he had helped his wife run their store and luncheonette; the store was his—he inherited it from his mother; his wife operated it with his aid (52). After the operation by Dr. Rini the ankle ulcer and varicose veins were cured (60); Dr. Rini examined his heart and told him it was all right; and that his blood pressure was normal (62).

On redirect examination plaintiff said that the plate (coaming) slanted straight—it was not curved; it was conceded that the width of the plate was three feet, two inches, running from the flange (which was six inches high) in a diagonal direction down to the level of the deck (64); some of the men stood on the covered half of the hatch, while they were removing the covers; plaintiff was outside the opening—outside the part of the hatch that was open (65). In answer to a juror's question plaintiff said the slant part is welded to the deck—it is what they call the walk (65); the coaming plate does not cover the hatch at all (69).

Petro Petrucelli, called on behalf of plaintiff, testified that on May 24, 1953, he was a hold man at work on board the ship "Steel Apprentice" when plaintiff fell in the hold; he belonged to the plaintiff's gang; he was on the shelter deck; he saw hatch covers piled up on one-half the hatch—they had to remove the hatch covers therefrom (124); he handed them to the plaintiff, who put them on the side in the wing; he saw plaintiff's feet slide and plaintiff fall from the shelter deck down to the 'tween deck—he fell from the coaming down into the hold (124).

Moody Saxon, called by plaintiff, testified that he was a member of the gang working with plaintiff in the hold when plaintiff was hurt; he was on the same deck with plaintiff; they were moving hatches; he and his partner were passing them over to the plaintiff and the latter's partner (125); plaintiff was standing on the coaming; the coaming reached from the hatch out down to the deck, about twenty-four to twenty-eight inches (126); there was cargo in the wings; there was a fence with lashings or rope to hold the cargo in; the cargo came practically to the edge of the coaming; plaintiff was standing on the edge of the coaming; plaintiff took a hatch cover off and when he went to make a turn to get a rope to tie the hatch cover down, his feet slipped out from under him and he fell to the 'tween deck (127).

Saxon said of the particular place where plaintiff fell, "It looked like there was some grease there. It was [illegible] there was dirt" (127); the men below brought plaintiff up on a pallet, and then over the side of the boat to the dock; where plaintiff was working the lights were very dim; on the shelter deck there was only the one light over by the ladder that leads from the main deck to the shelter deck; in the 'tween deck there was light but it was not [illegible] up where they were (128).

On cross examination, Saxon said that when he was working there he was about the length of a hatch cover—about eight feet, about eight or ten feet—from the plaintiff (129); he did not recall exactly what color clothes plaintiff had on; he saw plaintiff slip and fall, and he looked over the edge of the hatch and saw him ten or twelve or thirteen feet below (130); it was soon after plaintiff fell (about five minutes) that Saxon went and looked at the grease; they could see where plaintiff had been standing, where he had to stand to handle the hatch covers; Saxon himself stood on the hatch covers—on the part that was covered over; from the grease spot where

plaintiff fell to the end of the hatch covers where Saxon had walked as far as he could was about two feet (132); it was a patch of grease that Saxon saw—he could not tell how large it was (132); he could not see its color so good in the light that was there—all he saw was grease, dirt lying there (133); there was a little straw, like hay, and trimmings from the carpenter's work, in the grease (134); his best estimate of the size of the patch of grease was about five or six inches (134); Saxon did not tell any of the ship's crew about it—he didn't see any of them; he did tell the Jarka employees who were working there (135); he had never testified in court before (136).

Frank D'Amico, called by plaintiff, testified that on May 24, 1953, he was in the gang that was working during the day in the No. 3 hatch of the "Steel Apprentice" up to about 8 P. M., when they were transferred to the No. 2 hatch (137); when they went down in the No. 2 hatch there was one section of the hatch that was covered—all the other hatch covers were placed upon that covered section; the hatch is divided by a center beam into two sections; on one section the hatch covers had not been removed and on top of that section were the hatch covers from the open section; they had to put those hatch covers into the wing (138); the coaming extended from the edge of the hatch toward the wing about twenty inches or better; there was cargo in the wings which came right up to the edge of the baffle plate, that is, the slanting part of the coaming (139); D'Amico was working on the opposite side from the plaintiff; he noticed plaintiff and saw him fall into the 'tween deck (140); he did not recall any light at the end where they were working—there were lights in the 'tween deck, but they pointed down towards the cargo in the 'tween deck—they had none up on the shelter deck where they were working (140).

On cross examination, D'Amico said that he got to about five or six feet from the place where he saw the grease;

it was just a patch or spot of grease; he didn't measure it; it was the color of grease—he didn't know the color (142); D'Amico said he had known plaintiff intimately seven or eight years—he had never eaten at his home—by intimately he meant he had known him ever since plaintiff came to work in the same gang with him (143).

Angelo Rizzo testified on behalf of plaintiff that on May 24, 1953, he was working in plaintiff's gang on the Isthmian Line steamship "Steel Apprentice"; around half-past eight that evening he was down on the shelter deck with plaintiff when they were moving hatch covers from the square of the hatch to the wings (146); there was cargo in the wings; the cargo came approximately to the edge of the coaming—the coaming sloped down about thirty-six inches to the cargo (147); he saw plaintiff fall down the hatch; he did not look at the part of the coaming to see if there was anything on it when plaintiff fell—he just saw him fall down (148).

Helen Rotondo testified that she was plaintiff's wife; they were married in 1937; since their marriage she had operated a store and luncheonette; their daughter (seventeen) helped her after school in the store (155); prior to May 24, 1953 (the date of the accident) her husband also helped her; he worked as a longshoreman, and after his days' work he relieved for a few hours in the store (151); since the accident he would do a few hours work a day in the store, but he did no heavy work (152); subsequent to the accident and his return from the hospital his demeanor to her changed completely (153); from that time on they had no sexual intercourse—apart from that one point he was still affectionate and was still the same husband as before (154); she knew Dr. Rini; the last time Dr. Rini treated her husband was about eighteen months ago (164); at that time Dr. Rini told her there was nothing more he could do for her husband, who complained of weakness and that he had no strength (165).

Plaintiff called Dr. Nunzio A. Rini who had been a practicing physician in Brooklyn for 33 years, associated with Long Island College Hospital and St. Peter's Hospital; he took over the plaintiff's case on June 11, 1953; he viewed the X-rays taken at St. Peter's Hospital, and examined plaintiff; he found plaintiff had abrasions (brush burns) and contusions of the right forearm and the back of the thorax on the right side; he had swelling and ecchymosis in the left buttock; swelling and tenderness in the right ankle, due to a sprain; swelling and tenderness about the right shoulder; marked restriction on forward bending, associated with spasm and rigidity of the lumbar muscles; also swelling and tenderness in both inguinal regions, and marked tenderness in the left thorax at about the level of the 8th to 12th ribs (77).

Later, about August, 1953, plaintiff started to complain of some urinary symptoms and Dr. Rini sent him to a genito-urinary surgeon for consultation (77); about October of the following year (1954), Dr. Rini operated on plaintiff for some previously existing varicose veins,—the operation was because he was developing an increased ulceration in one of his legs (77). At the time plaintiff complained of the urinary symptoms, he was having blood showing in the urine; he had also what Dr. Rini called a disfunction of his sexual behavior—plaintiff said he just couldn't have any marital relations with his wife (78).

Plaintiff continued under Dr. Rini's treatment until January 14, 1955, when the doctor discharged him, not as cured, but because he could do no more for him and it was useless for plaintiff to keep coming for baking and physiotherapy (78); it was Dr. Rini's opinion that plaintiff had sustained a post-traumatic neurosis as a result of his injury (79).

Dr. Rini said, based on his general practice and on his experience in hospitals and in his office practice, that

the injury plaintiff sustained was a competent producing cause of the post-traumatic neurosis (84); he could diagnose an existing post-traumatic condition; and in his opinion the post-traumatic neurosis which he found existing was a competent producing cause for plaintiff feeling that he could not work at the docks any longer (85-86); plaintiff's sexual disfunction definitely followed from the same cause (86); the genito-urinary man to whom Dr. Rini had sent the plaintiff, was of the opinion (referring particularly to the blood in the urine) that plaintiff had pelvic congestion and associated posterior urethitis—that is, inflammation of the posterior part of the urinary bladder (86); and that the above findings were a competent producing cause of plantiff's local symptoms (87); and it was Dr. Rini's opinion that while plaintiff's urinary complaints were not a direct result of the injury sustained to his back, they were mainly due to a neurotic source coming from the accident itself (87). Dr. Rini said that up to January 14, 1955, he treated plaintiff approximately three times a week; and that his bill for his services (eliminating the treatment for varicose veins and matters not connected with the accident) was $1,044 (88).

On cross examination Dr. Rini said that the X-rays taken at St. Peter's Hospital showed a fracture without displacement of the posterior lateral aspect of the left ninth rib, and possibly an associated fracture of the tenth rib (90-91); the hospital record was marked in evidence as Defendant's Exhibit A (89); the physical conditions for which Dr. Rini treated the plaintiff would ordinarily be cleared up within nine or ten weeks, except that how long it would take for the marked restriction to forward bending (associated with spasm and injury to the lumbar muscles) to clear up, was undeterminable (96) and with the exception of the pain in the back—there was no way of telling how long that might persist (98); years before plaintiff had a hernia—Dr. Rini did not do anything about his inguinal region (97).

Dr. Rini said that in the great majority of people neurosis does not manifest itself as a result of trauma, but there are some who do so react (99); 240 pounds was an abnormal weight for plaintiff, but that did not in itself show a neurotic tendency (100); plaintiff went from 240 to 280 pounds probably because he was eating more and was not using up energy by working (100); his blood pressure, 160 over 110, was not unusual in a heavy individual (102); the hospital records showed cardiac enlargement, arteriosclerotic or hypersensitive in type, but in this particular case plaintiff had the ulcerations of the leg not because of arteriosclerosis but because of very large varicose veins (110-112); Dr. Rini did not see any physical injury to plaintiff's sexual organs (119); later he urged plaintiff to go back to work but plaintiff did not go to work —he explained that he was weak, that he couldn't bend over and he couldn't lift anything (120).

Defendant called no witness other than Dr. Romeno Auerbach; he testified that he had been a physician for 38 years; he had specialized in traumatic surgery (173); he examined plaintiff in March, 1954; the history given him was that plaintiff, on May 24, 1953, slipped on grease and fell thirteen feet into the hold of the ship (175); Dr. Auerbach did not view the X-rays (175); the history of the injuries, as given to him was "an oblique fracture of the posterior and lateral aspect of the left ninth rib with possible incomplete fracture of the tenth rib" (176); Dr. Auerbach's examination revealed no discoloration, swelling, scarring or tenderness on pressure; plaintiff at that time complained of no pain (177); there were no markings on the right forearm and no complaint of pain on manipulation (177); there was no discoloration, swelling, scarring or tenderness on pressure on the right posterior thorax (178); there was a massive varicose vein of the entire right leg; there was no definite ulceration (178); there was complaint of mild discomfort in the right shoulder on elevation and rotation of the arm; there was complaint

of pain in the left lumbar region on forward bending (180); there was a complaint of an aggravation of a bilateral inguinal hernia on the right and left side (181); there was also complaint of disfunction of sexual behavior; in Dr. Auerbach's opinion that condition and the urinary conditions did not result from the accident (182-185); it was his opinion that it was doubtful whether plaintiff was at that time totally disabled due solely to his accident (182); a blood pressure of 160 over 110 is a high blood pressure and a pulse of 90 is above normal (185); plaintiff for his age and height, was, in Dr. Auerbach's opinion, greatly overweight (186).

On cross examination Dr. Auerbach said he was not a psychiatrist; when asked if he would dispute the statement made here that as a result of his fall and shock plaintiff was now suffering from post-traumatic neurosis, Dr. Auerbach said that he could neither dispute the statement nor agree with it (188); the sexual disfunction of which plaintiff complained might, in Dr. Auerbach's opinion, be due to different conditions but one cause could be an injury, a blow, or a fall (193); premature ejaculations are sometimes common in impotency; and there was no doubt, in the doctor's mind, that impotency could be associated with a shock resulting from a trauma (193, 199).

Dr. Auerbach said that his examination of plaintiff took about twenty minutes to a half-hour (196); he had never seen plaintiff before, nor had he seen him since (196); the doctor said he might have made two or three examinations that same day, or he might have made nine or ten—he probably made twenty examinations a week (198).

Defendant read from the nurse's notes from the plaintiff's hospital record (Defendant's Exhibit A) following the accident and also following his admission to the hospital in October, 1954, when he was operated on for the varicose veins (200-206). The defendant then rested its case (206).

Plaintiff thereupon read from the withholding slips of his employers showing that from the beginning of the year 1953 up to May 24, 1953 (a period of four months and 24 days), plaintiff in his work of longshoreman had earned approximately $2,600 (208); plaintiff's motion to increase the amount of his demand herein to $125,000 was granted (210-211); and plaintiff thereupon rested.

No exceptions were taken to the Court's charge. The jury retired at 3:00 P. M.; at 4:20 P. M. the Court called the jury back into the courtroom and the following occurred:

"The Court: Madam foreman and members of the jury: I am going to order a sealed verdict, and a paper in the form of a ballot will be handed to you by the Clerk, and you will be given instructions as to it.

Just before that is done, however, I would like to know whether I could help you in any way.

Yes, madam?

A Juror: Your Honor, I would like to know if, for instance, if we are in favor of the defendant, and I am just giving you a for instance, can the plaintiff be awarded any amount?

The Court: If you find the defendant is not liable, then the plaintiff cannot be awarded any amount.

A Juror: Any amount, that is what I wanted to know.

A Juror: I should like to know if the plaintiff has any other avenue open to him if we disagree.

The Court: I am afraid that isn't a matter for consideration.

Generally speaking, of course you know there is in the State of New York a compensation statute between employers and employees.

Any other questions?

Then you may retire.

Mr. Gallagher: If your Honor pleases, on that question may I be heard for just a moment?

The Court: You may be heard at the Bench. Ladies and gentlemen, you may retire.

(At this point the jury retired to the jury room.)

(The following occurred at the Bench):

Mr. Gallagher: Your Honor, this accident happened in 1953, and with reference to compensation, I feel the statute of limitations would bar us.

"The Court: I am not going into that, I will not discuss that." (244-245)

On May 2, 1953, the jury rendered a sealed verdict in favor of the defendant (246).

Plaintiff's motion (made immediately thereafter) to set aside the verdict as contrary to the law and against the evidence, contrary to the weight of the evidence, and on all the other grounds that would set aside the verdict, was denied, with an exception.

Plaintiff, at his counsel's request, was given ten days to prepare a further motion, if he desired to make one (247).

Thereafter, and within the ten days, additional reasons having come to light for the setting aside of the verdict, plaintiff made a motion to reargue the prior motion and for an order setting aside the verdict, and awarding judgment in favor of plaintiff, or in the alternative granting a new trial, upon the further grounds that the verdict was rendered on misconception of the law; that such verdict and judgment was a miscarriage of justice, and was rendered on mistaken ideas of the law, and on all the grounds set forth in the rules and practice of the Court in such case made and provided. The new and additional facts upon which said motion was made are set forth in the moving affidavit of plaintiff's attorney upon said motion, included in the record herein; and are more particularly referred to in Point II of this brief.

The said motion was denied without opinion, by an order made by Judge Galston on June 18, 1956.

On May 25, 1956, plaintiff filed and served notice of appeal from the said verdict rendered and judgment entered thereon on or about May 2, 1956, in favor of the defendant and against the plaintiff.

On July 3, 1956, plaintiff filed and served notice of appeal from said order of Judge Galston dated June 18, 1956.

On July 11, 1956, judgment was entered in favor of the defendant.

On July 26, 1956, plaintiff filed and served an amended notice of appeal, reciting the appeal from said judgment entered on July 11, 1956.

Thereafter, on October 1st, 1956, plaintiff applied to this Court of Appeals for an order directing and authorizing the Clerk of the United States District Court for the Eastern District of New York to furnish to plaintiff's attorney the names and addresses of the jurors who sat upon the said trial herein; and for permission to plaintiff's attorney to interview and question the said jurors, and put their statements in affidavit form, and for other relief. By this motion plaintiff endeavored to obtain the relief as to which his efforts in the Court below had theretofore proved unavailing. Upon the return day of said motion this Court denied the application with the suggestion and direction that a motion for similar relief be made in the District Court.

Accordingly, on October 24, 1956, plaintiff made a motion before Judge Galston for an order

> (a) Directing and authorizing the Clerk of the Court to furnish plaintiff's attorney with the names and addresses of the members of the jury who sat on the trial of the above entitled action and rendered verdict in favor of the defendant.

(b) Authorizing and permitting plaintiff's attorney to interview and question them as to the issues herein and put their statements in affidavit form; and

(c) If difficulty be encountered in accomplishing the provisions set forth in "b" that subpoenae be issued directing said jurors to appear at a specified time in open court and testify as to the matters herein set forth and give detailed information as to the same, and

(d) That plaintiff have such other and further relief as may be just, proper and equitable.

On November 9, 1956, Judge Galston made an order denying said motion. The order recites that "said motion having come on to be heard on the 24th day of October 1956, and application having been made on behalf of the defendant for an adjournment of said argument, to which plaintiff had consented, and the motion having been denied without argument or appearance on the part of the said defendant, except as stated"; and further recites that the said motion be and the same is in all respects denied. This motion was likewise denied without opinion.

On November 26, 1956, plaintiff filed and served notice of appeal from the said order of Judge Galston dated November 9, 1956.

Plaintiff-appellant contends that the verdict herein was contrary to the evidence; it was unsupported by any evidence; it was contrary to law in that the jurors ignored the Court's instructions and rendered a verdict contrary thereto and in violation thereof; and in so doing the jurors acted upon and were guided by a wholly mistaken conception of the applicable law, induced by extraneous circumstances and influences improperly brought to the attention of the jurors in the course of their deliberations.

The verdict so rendered, the judgment entered thereon, and the subsequent orders above mentioned, have resulted in a serious miscarriage of justice, which, it is respectfully submitted, may be and should be corrected by this Court upon the appeal.

POINTS

I

The verdict herein was contrary to the evidence; there was no evidence in the case upon which it could be based; it was contrary to the instructions; and otherwise contrary to law.

The Court below properly charged that plaintiff, a longshoreman on the vessel in the course of his duties, was an invitee toward whom the defendant owed the duty of reasonable care to provide him with a safe place to work.

The jurors disregarded the instructions and brought in a verdict for defendant based upon an entirely different and wholly erroneous conception of the law, brought about by the improper introduction into their deliberations of extraneous matters, as hereinafter set forth.

The uncontroverted testimony of the plaintiff and of the four disinterested witnesses who testified on his behalf, established beyond peradventure the failure of the defendant to perform the duty (as above outlined in the Court's instructions) owed to the plaintiff.

The uncontradicted evidence was that plaintiff in the course of his work, was required to be upon the coaming of the No. 2 hatch on the shelter deck; all day long from 8 A. M., until about 8:30 P. M., plaintiff and his men had worked at the No. 3 hatch; it was only about fifteen minutes before the accident that they were transferred to the No. 2

hatch; and plaintiff had been at the particular place on the coaming only about three or four minutes before he slipped and fell therefrom (40).

The coaming (a steel plate about three feet in width) at the edge of the hatch opening was about six inches above the level of the shelter deck and slanted down to the deck level. The cargo in the wings (with the loading of which plaintiff had nothing to do) crowded upon and cut down the width of the space on the coaming—so that the actual space thereon, where plaintiff was at work, was only about thirty inches—and that space was on the slant of the steel coaming (22).

The part of the shelter deck where plaintiff and his men were at work was dimly lighted; at that part of the deck there were no lights—a single light forward at or near the ladder from the main deck was the sole light; the two flood lights in the 'tween decks pointed down and afforded no light to the shelter deck. The surface of the coaming was dirty, with grease and dirt.

Due primarily to the grease the crowded space in which to work, and the insufficient light plaintiff slipped and fell into the hatch to the 'tween decks about thirteen feet below, sustaining serious and permanent injuries.

All the above was established by the testimony of plaintiff and his four co-workers. It was not disputed by defendant whose sole evidence was medical—the testimony of Dr. Auerbach, who had examined plaintiff about ten months subsequent to the accident—an examination which took about twenty minutes or a half-hour. Dr. Auerbach had not seen plaintiff before or since; he testified with respect to the examination and as an expert—his testimony did not weigh heavily against that of Dr. Rini, who treated plaintiff from the day he left the hospital and during a period of twenty months thereafter.

Defendant's counsel in his summation expressed the opinion that plaintiff might have lost his balance; but this was pure speculation and of no weight as against the definite factual testimony of plaintiff and his four disinterested witnesses. It was said by defendant's counsel that plaintiff did not see the grease before he fell, and of course that is so; but plaintiff was aware of the sensation of slipping (as his feet suddenly went out from under him) a sensation quite different from that of losing one's balance.

Petrucelli's testimony was that he saw plaintiff's feet slide out from under him and saw him fall (124); Saxon said he saw plaintiff slip and fall, and that he saw the grease and dirt at the place where plaintiff fell (127); D'Amico, who noticed plaintiff and saw him fall, said he got within five or six feet of the place where he saw the grease and where plaintiff fell (142); and he added that they had no light on the shelter deck where they were working (140).

Defendant admitted it had no witnesses to refute or contradict any of the factual evidence, though there were at least four other men working at the time on the shelter deck; and as to the insufficient light and the crowded loading of the cargo, there were doubtless available to defendant the members of its crew and the officers of its vessel to testify to the condition if it was any different from that described in the plaintiff's testimony—but none was called by defendant.

This is not a case where there was conflicting testimony on the issue of liability—it is a case where there was *no evidence* to support the verdict of the jury.

Where there is no evidence on which a jury may base a verdict the court does not invade the province of the jury by taking a case from it and entering a judgment

accordingly. *Stephens* v. *Sears Roebuck & Co.*, 7 Cir., 212 F. 2d 260.

Where evidence is so overwhelming on one side as to leave no doubt what the fact is, a trial court should direct a verdict or render judgment notwithstanding the verdict. *State of Washington* v. *United States*, 9 Cir., 214 F. 2d 33. The power of the court in this respect extends to all cases where the ends of justice require its exercise. *De Vito* v. *United Air Lines, Inc.*, 98 F. Supp. 88. The instant case is much stronger than those last cited, for here there is no evidence on the issue of liability to support the jury's verdict.

It should be added that "a jury has no right arbitrarily to ignore or disregard the testimony of unimpeached witnesses so far as they testify to facts, and a willful disregard of such testimony will be ground for a new trial." *United States* v. *2,049.85 Acres of Land*, 49 F. Supp. 20 (citing *The Conqueror*, 166 U. S. 110, 131). In *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U. S. 209, 217, the court quoted at length from *Hull* v. *Littauer*, 162 N. Y. 569, in part, as follows:

> "Where, however, the evidence of a party to the action is not contradicted by direct evidence nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor in nature surprising or suspicious, there is no reason for denying its conclusiveness."

In the instant case the testimony rejected by the jurors was not merely the unimpeached testimony of a party, but was that of disinterested witnesses whose testimony was in no way discredited. The case is one calling for exceptional care on the part of the court in ascertaining whether the verdict (plainly a miscarriage of justice) was or was not the result of matters outside the evidence improperly

brought to the juror's attention. In *State* v. *Scala*, 38 N. J. Super. 568, 576, it was said:

> "In practice, where the verdict is manifestly discordant with the weight of the competent, relevant and credible evidence, the effectiveness of some improper influence may then be logically inferred."

The language last quoted may be aptly applied herein, with the qualification that here the verdict was not one contrary to the weight of the evidence—for here the verdict, on the issue of liability, was *without any evidence* upon which it could be based.

It should be further noted that the Court's instructions properly included comparative negligence; the verdict could not, therefore, be based upon any unwarranted and unsupported finding of alleged contributory negligence.

There can be no possible explanation of the verdict herein other than that it was the result of extraneous matters improperly brought into the jury room, with respect to which (as pointed out below) the Trial Court foreclosed inquiry.

II

The affidavit of a juror is admissible, or his examination by the Court will be permitted, on the question of the existence of any improper extraneous influence, though not as to how far that influence may have operated upon his mind.

(1)

The District Court's refusal herein to make inquiry whether extraneous and prejudicial matter was injected into the juror's deliberations; and its refusal to permit plaintiff's attorney to ascertain from the Clerk the names and addresses of the jurors in order to expedite such an

inquiry, constitutes (under the circumstances of this case) reversible error.

"A reviewing court is always reluctant to disagree with the determination of the trial judge that the verdict of a jury was not influenced by outside matters, yet the reviewing court has a duty to see that there is no miscarriage of justice". *Paramount Film Distributing Corp.* v. *Applebaum*, 5 Cir. 217 F. 2d 101, 106.

In *Fort Worth & Denver Ry. Co.* v. *Thompson*, 5 Cir. 216 F. 2d 790, 792 (citing and quoting *City of Amarillo* v. *Emery*, 5 Cir., 69 F. 2d 626, 627) it was said:

> "While a juror may not testify to a matter resting in his personal consciousness, affidavits of jurors, which show overt acts constituting misconduct or that extraneous matters that might influence the jurors have been brought to their attention, are admissible."

The principle here involved was clearly stated in *Mattox* v. *United States*, 146 U. S. 140, though in that case the extraneous matter (a newspaper article commenting upon the case read to the jurors during their deliberations and before they had agreed as shown by jurors' affidavits) was held properly presented by jurors' affidavits on a motion for a new trial. The case contains a plain and succinct statement of the law by Chief Justice Fuller, as follows:

> "But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind."

Referring to its decision in the *Mattox* case and in *United States* v. *Reid*, 53 U. S. 261, the Supreme Court of the United States (in concluding its decision of the sub-

ject in *McDonald* v. *Pless*, 238 U. S. 264, 267, (cited and relied on by the defendant herein) said:

> "Both of these decisions recognize that it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice'."

In *Stevenson* v. *Tennessee Copper Co.*, 193 F. 268, it was said in the Circuit Court of Appeals, by Sanford, D.J.:

> "It must be deemed settled in *Mattox* v. *United States*, 146 U. S. 141, 151, that in the Federal courts in matters where the testimony of jurors is admissible for the purpose of setting aside a verdict, an affidavit is the proper method of embodying the testimony of the juror and bringing the matter to the attention of the court."

In the case last cited (where certain of the jurors in the jury room expressed their own opinion (which they purported to give as authentic), as to values and prices of timber of the kind and quality involved) Judge Sanford further said:

> "I am therefore constrained to hold, in view of this opinion in the *Mattox* case, that the affidavit of a juryman is admissible as to any facts bearing upon the question of the *existence* of any extraneous influence brought to bear upon the jury in their deliberations, constituting misconduct, open to the knowledge of all the jury and not alone resting within the personal consciousness of one." (Emphasis supplied.)

To the same effect:

Texas & New Orleans R. R. Co. v. *Underhill*, 5 Cir., 234 F. 2d 620, 624;

Miles v. *Laurie*, 6 Cir., 211 F. 2d 184;

Southern Pacific Co. v. *Klinge*, 10 Cir., 65 F. 2d 85, 88.

In *Stiles* v. *Laurie, supra*, an automobile negligence case, it was held reversible error not to grant a new trial where one of the jurors brought a manual to the jury room purporting to show how far a car would skid at various speeds (as shown upon a motion for a new trial by the affidavits of jurors). The Court said (at p. 189):

> "Generally, a juror's testimony will not be received, either to impeach or support a verdict, but it may be received if it relates to extraneous influences brought to bear upon the jurors; they may show by their testimony what the extraneous influence was, and whether it was of a nature calculated to be prejudicial. * * * It is not for the court to say whether there was sufficient evidence adduced at the trial to justify the finding of the jury, and that the evidence received by them could have had no effect on the verdicts."

It is not necessary that there should be any wilful misconduct, or that any jurors were acting other than in good faith. Nor is it necessary that there be any positive finding that the jury were actually influenced by what took place—there is involved rather a determination as to whether it was made reasonably certain that they were not. *Paramount Film Distributing Corp.* v. *Applebaum*, 5 Cir., 217 F. 2d 101, 106, *supra*. Where a motion is made for a new trial because of alleged misconduct of jurors (as shown by affidavits) generally the trial court should entertain the application—the disposition to be made thereof rests in the sound discretion of the court.

Where discretion is lodged it must be exercised—it was so stated by Taft, C.J. (later Chief Justice Taft) in *Felton* v. *Spiro*, 8 Cir., 78 F. 576, where the learned Judge further said:

> "In *Hallox* v. *United States*, 146 U. S. 140, it was held that, where the trial court excluded affidavits offered in support of a motion for a new trial, and

in passing upon the motion exercised no discretion in respect of the matters stated in the affidavits, the question of the admissibility of the affidavits was preserved for the consideration of the supreme court on writ of error, notwithstanding the general rule that the allowance or refusal of a new trial rests in the sound discretion of the trial court."

As a basis for the exercise of discretion the trial court should make or cause to be made such investigation as may be reasonably called for. Thus, in the case of *Poindexter* v. *Greves*, 2 Cir., 197 F. 2d 915, 919, where a juror wrote a letter to defendant's counsel that the verdict for plaintiff was not her verdict and that she had yielded under pressure in the jury room, the trial judge caused her to appear before him and submit to most careful questioning —whereupon he decided that no proper case was presented for a new trial, *but the important thing is that an investigation was had*—which was refused in the case at bar. A recent case more nearly like the instant case in its facts than any above cited is *State* v. *Kociolek*, 20 N. J. 92, where the applicable law is fully set forth in a careful and well-reasoned opinion by Mr. Justice William J. Brennan, Jr., then of the New Jersey Supreme Court and now of the Supreme Court of the United States. In that case it appeared that upon a trial for first degree murder, the jury had reached a unanimous agreement upon defendant's guilt, but could not reach a decision "on the chair or life imprisonment." At that point there was injected into the discussion of the problem the assertion by several members of the jury that the defendant was the same one charged with atrocious assault and battery on one Glenn (not the deceased) one day before the date of the commission of the crime which was the subject of the present prosecution. Thereafter reference to the Glenn incident recurred repeatedly in the jury's deliberations. The jury arrived at the agreement not to recom-

mend mercy only after some of the jurors recalled, and the entire jury then considered another indictment against the defendant, not in evidence, to which the defendant, two weeks before, had pleaded not guilty *within the hearing of the panel* of which the jurors, or several of them, were members. In granting a new trial, Mr. Justice Brennan wrote:

> "The better reasoned decisions support the exclusion of the jurors' testimony as to their mental processes, not upon the discredited basis of the policies against self-stultification and evidence of jury-tampering, perjury or other fraudulent practices, but upon the sounder ground that, being personal to each juror, the working of the mind of any of them cannot be subjected to the test of other testimony, and therefore that such testimony should not be received to overthrow the verdict to which all assented (citing cases). Where, however, jurors' testimony goes not to the motives or processes by which they reached their verdict, but merely to the existence of conditions or the occurrence of events bearing upon the verdict, that basis of policy does not exist, and this whether the condition happens or the event occurs in or outside the jury room."

And the learned Justice added that with this limitation upon evidence of extraneous matters, "sound policy is satisfied *and at the same time the evidence can serve to avert, as here, a grave miscarriage of justice* which it is certainly the first duty of a court of conscience to prevent if at all possible."

(2)

In the instant case the facts whereby it appears that extraneous matters were improperly brought to the attention of the jurors, appear in the moving affidavit of

plaintiff's attorney upon the application made in this Court, returnable on October 1, 1956, for an order directing the Clerk of the Court below to furnish plaintiff with the names and addresses of the jurors, and for other relief.* The facts also appear in the affidavit of plaintiff's attorney upon the motion thereafter made in the District Court, returnable October 24, 1956, at the suggestion and direction of this Court. From the order denying that motion, plaintiff appealed.

The facts, as they appear in the moving affidavit of plaintiff's attorney upon said application in the District Court, include the following:

The sealed verdict directed herein, when opened on the following morning, was in favor of defendant.

Leaving the courtroom after the rendition of verdict, the deponent, the plaintiff's attorney, was explaining as best he could to his client, the plaintiff herein, what the verdict actually meant as rendered; and he told plaintiff he felt the verdict was a mis-carriage of justice and should have been in favor of the plaintiff instead of the defendant. Several of the jurors then in the corridor, of their own accord, joined in the conversation and volunteered the information that the party sued, the defendant Steamship Company, had been an improper party because the said jurors knew (as they thought) that the ship was not responsible and that his employer should have given him a safe place to work.

At that time the deponent did not know the names of these jurors and could not identify them by name, but he emphatically stated, that he did identify them as members of the jury who tried this case and rendered the verdict above referred to.

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* The papers on that application are on file in the office of the Clerk of this Court; and plaintiff-appellant respectfully asks that such papers be deemed part of the appeal papers.

One of the jurors then commiserating with the plaintiff and deponent about the outcome was the forewoman; she complimented deponent on the way he handled the preparation and trial, but said "You made a mistake—you sued the wrong party—you should have sued his employer."

While this discussion was going on about five of the jurors who had been on the jury joined in and another woman juror stated "Yes, that's right, you should have sued the employer." All of the jurors present appeared in accord with these statements then being made by those in the discussion, and the forewoman above mentioned stated "You should have sued Jarka, the employer, for you know the law says that the 'employer must provide a safe place for the employee to work.' You sued the ship and that was wrong."

Deponent, in attempting to learn the true state of facts, mentioned that the jurors were actually the ones who were mistaken and confused in the law; and that the Judge did explain the law properly but they interpreted it incorrectly.

In the general conversation that was had, these jurors said they could not be mistaken as to the law because Judge Galston had definitely stated it to them in another case on which several of them had sat. It appeared that several of the jurors were members of the jury in the case of *Wells v. New York Central Railroad*; which was tried in the same courtroom and before the same Judge immediately before the trial herein. That was an action brought by a railroad employee under the Federal Employers Liability Act. It is well known that under the Federal Employers Liability Act the "employer must provide a safe place for the employee to work."

Deponent believed (and so stated) that this case was taken into the jury room and thrashed out by several jurors, who evidently prevailed, on the theory and under

instructions as given them in the railroad case that had been tried immediately prior; and that these jurors were able to convince the rest of them that the law was the same in this case, and that the present action should have been brought against the employer as prescribed in the Federal Employer's Liability Act.

Permission was thereupon asked, on said motion, to obtain the names and addresses of the jurors who rendered the verdict for the defendant in this case, and to interview them and obtain statements as to the above; if this was not accomplished under such an order, deponent further requested an order to provide that subpoenae issue, directing them to testify in court with reference to the facts.

As stated above the motion was made to the Judge who presided at the trial of this action, at the suggestion and direction of the Court of Appeals, made on October 5, 1956, during the argument of motion for similar relief there made.

It was further said by the deponent that, in his opinion (and it was respectfully submitted) there was a miscarriage of justice here; regardless of the extent of the injuries sustained by plaintiff, negligence on the part of the ship was definitely established, and in fact not even disputed; and the verdict should have been in favor of the plaintiff and against this defendant.

It is further respectfully submitted the facts as hereinbefore narrated called for and required further investigation—such as was had by the trial court in the case of *Poindexter* v. *Groves*, 2 Cir., 197 F. 2d 915, 919, above referred to.

To leave the case as it now stands, without the further investigation called for herein, would mean that although the sole evidence on the issue of liability (not disputed by defendant) was in favor of plaintiff, yet the defendant has had a verdict.

The result was plainly due to the erroneous conception of the law improperly introduced by some of the jurors into their deliberations; affidavits of jurors to that effect are admissible under the foregoing authorities; and plaintiff's efforts to procure such affidavits or otherwise to obtain the desired and necessary information, under the Court's direction and supervision, should have been heeded and given effect in the Court below.

Reference may properly be made herein to the case of *Southern Pacific Company* v. *Klinge*, 10 Cir., 65 F. 2d 85, 88. In that case, while the jury was deliberating, one juror said to the others that he had been told defendant had offered $20,000 in settlement of the case; and after an overnight adjournment that he had investigated and found it to be the fact. There was a verdict for plaintiff in the sum of $27,000. In reversing the judgment and granting a new trial, the Court said:

> "It need hardly be said that nothing could be more prejudicial to a defendant's rights. It would be an unusual juror who would have the courage to return a verdict for less than the defendant had offered where liability was conceded. * * *
>
> If the jury system is to last, it is important that verdicts should not be set aside for trifling reasons; *of still greater importance is it that a jury's verdict, although misguided should be a verdict 'on the law and the evidence'.*" (Emphasis supplied.)

III

Reference to the New York State Compensation Law (interjected into the case by the Court below) constitutes reversible error.

In the colloquy between the Court and the jury (set forth in full on page 15, above) it appeared that a juror asked "if, for instance, if we are in favor of the de-

fendant, and I am just giving you a for instance, can the plaintiff be awarded any amount?" The Court's answer was, of course, in the negative; but it is difficult to see how a juror of ordinary intelligence could ask such a question, unless it was because the jurors, relying upon the mistaken statements of the law made by some of the members, had concluded after discussion that plaintiff had sued the wrong party, but nevertheless they would have liked to give him something (244).

More important was the question of another juror who said "I should like to know if the plaintiff has any other avenues open to him if we disagree"; and the Court's answer; "I am afraid that isn't a matter for consideration. Generally speaking, of course, you know that there is in the State of New York a compensation statute between employers and employees" (245). Plaintiff's counsel's effort to be heard upon an objection met with an abrupt termination.

No exception was noted; but under Rule 46 of the Federal Rules of Procedure, an exception was unnecessary. Apart from the rule, however, the error was so far fundamental that it is within the province of a reviewing court in any event to take notice thereof, to prevent a miscarriage of justice.

Interjection into the case of the New York State Compensation Law was a two-fold error. In the first place, in this matter of maritime jurisdiction the State Compensation Act had no application. The matter having been mentioned, the Court should have withdrawn its statement, and stated to the jury that the Workmen's Compensation Board of the State of New York had no jurisdiction and could not afford plaintiff any relief. As it was, the jury were left with the erroneous impression that if they were to give plaintiff nothing (as they felt they would have to after their mistaken discussion of the law) nevertheless, the plaintiff would recover something by way of the New York State Compensation Act.

In the second place, any mention of *compensation* was out of place and constitated reversible error.

In *Zimber* v. *Kress*, 225 App. Div. 16, 18, it was said:

> "It was no subject for the consideration of the jury that the plaintiff might, if he failed in the present action, secure certain compensation from his employer or the insurance carrier."

In that case it was further said "*We deem this extraneous matter highly prejudicial*"; and that the introduction of such matter constituted reversible error.

To the same effect: *Regan* v. *Frontier Elevator & Mill Co.*, 211 App. Div. 164, where it was held to be reversible error though no exception was noted; also, *Luther* v. *Jacobs*, 282 App. Div. 809.

CONCLUSION

The judgment and orders appealed from should be reversed, a new trial granted, and the case remanded to the District Court with a direction to grant the plaintiff's motions.

Respectfully submitted,

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